Schrader

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

JACOB FREDERICK JOCHUM, and
JACOB F. JOCHUM, JR., d/b/a
JACK JOCHUM TRUCK SERVICE,

Plaintiffs,

v.

Civil Action No: 06-C-415
Honorable Martin J. Gaughan

WASTE MANAGEMENT OF
WEST VIRGINIA, INC., et al.,

Defendants.

ORDER

This matter came before the Court by way of Defendant, Waste Management of West Virginia, Inc.'s Motion for Summary Judgment. Plaintiffs, Jacob Frederick Jochum and Jacob F. Jochum, Jr., d/b/a Jack Jochum Truck Service ("Plaintiffs"), are represented by counsel, Melvin W. Kahle, Jr., Esq., of the law firm Schrader, Byrd & Companion, PLLC. Defendant, Waste Management of West Virginia, Inc. ("Defendant"), is represented by counsel Edward J. George, Esq., of the law firm Robinson & McElwee, PLLC.

The Court has studied and reviewed the Defendant's Motion for Summary Judgment; the Plaintiffs' Response to Defendant's Motion; the Defendant's Reply to Plaintiffs' Response; all memorandums of law in support; exhibits, affidavits, and deposition testimony submitted by the parties; considered all papers of record; and reviewed the pertinent legal authorities. As a result of these deliberations, and for the reasons set forth below, this Court has concluded that Defendant, Waste Management of West Virginia, Inc., is entitled to Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.

Opinion

Facts

This lawsuit was instituted by Plaintiffs against Defendant as an action for breach of contract and detrimental reliance. On March 8, 2004, Plaintiffs and Defendant entered into an Asset Purchase Agreement (the "Agreement") wherein Defendant agreed to purchase Plaintiffs' assets including the rights to Plaintiffs' certificates of convenience and necessity (the "Certificates"). Under W.Va. Code § 24A-2-5, it was "unlawful for any common carrier by motor vehicle to operate within this state without first having obtained from the [Public Service Commission of West Virginia] a certificate of convenience and necessity." Through the transfer of Plaintiffs' Certificates, the Defendant would have been permitted to enter the West Virginia solid waste hauling market and cross state lines in the transportation of solid waste.

However, on April 11, 2006, while the governmental approval of the Certificates transfer was still being decided, the United States Magistrate for the United States District Court for the Southern District of West Virginia issued the opinion of *Harper, et al. v. Public Service Commission of West Virginia, et al.*, 427 F.Supp.2d 707 (S.D. W.Va. 2006). In *Harper*, the Court "declared that West Virginia Code § 24A-2-5 is invalid insofar as it requires solid waste haulers engaged in the interstate transportation of solid waste to obtain a certificate of convenience and necessity from the PSC prior to providing those services." 427 F.Supp.2d at 724. The Court in *Harper* "permanently enjoined" the Public Service Commission from interfering in the "interstate transportation of solid waste from West Virginia to other states" when the issue pertains to a business's failure to obtain a certificate of convenience and necessity.

Then, on April 26, 2006, Defendant gave notice to Plaintiffs that it was terminating the parties' Agreement pursuant to Section 9(e) because the *Harper* ruling adversely affected the value of Plaintiffs' Certificates, and thus made the transaction less economic. Section 9(e) of the Agreement states:

> "**NOW, THEREFORE**, in consideration of the foregoing premises and the mutual covenants herein contained, and intending to be legally bound, the parties agree as follows:
>
> **9. CONDITIONS TO BUYER'S CLOSING.** All obligations of Buyer to close hereunder are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing, of the following conditions:
>
> (e) No law, rule, regulation, order, writ or judgment of any court, arbitrator or other agency of government or any agreement to which Buyer or an affiliate of Buyer is bound shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby."

Upon notice that Defendant was terminating the Agreement, Plaintiffs instituted this present action by filing a Complaint in the Circuit Court of Ohio County on November 6, 2006.

Parties' Contentions

The Defendant contends the ruling in *Harper*, which declared W.Va. Code §24A-2-5 unconstitutional, made Plaintiffs' Certificates and the Agreement less economic, thus giving Defendant the right to terminate the Agreement. Defendant contends there are no genuine issues of material fact with respect to whether it breached the Agreement with Plaintiffs because §9(e) of the Agreement is directly applicable to the present case. Section 9(e) states "No law, ...writ or judgment of any court, ...shall have prevented or prohibited or make less economic the consummation of the transactions contemplated hereby." Defendant argues the possibility of a ruling such as *Harper* was the specific reason the parties negotiated, and agreed upon, §9(e) of the Agreement. Therefore, because there are no genuine issues of material fact that the ruling in *Harper* made the parties' Agreement "less economic," the Defendant moved this Court for an

order granting it summary judgment against Plaintiffs' claims of breach of contract and detrimental reliance.

The Plaintiffs contend that §9(e) of the Agreement applies only if new laws, Public Service Commission regulations, or taxes increase the Defendant's cost of continuing Plaintiffs' business resulting in less profit. Plaintiffs contend the §9(e) phrase "*make less economic the consummation of the transactions*" applies only to any new law making its business less profitable. Plaintiffs argue that Defendant has failed to prove that Plaintiffs' business has suffered any decrease in revenues through increases in taxes, costs of doing business, environmental controls, or otherwise. Similarly, Plaintiffs contend §9(e) is ambiguous because Defendant interprets the phrase "*make less economic the consummation of the transactions*" to apply directly to the purchase price of the business while Plaintiffs interpret the phrase to apply only to any loss of profits from continuing Plaintiffs' business. Plaintiffs argue that under their interpretation of §9(e), the *Harper* decision does not make the Agreement materially less economic because Defendant would still acquire Plaintiffs' customers, equipment, and goodwill.

Legal Authorities

First, this Court must determine whether the Agreement of the parties had closed, or stated differently was completed and operative, before the condition precedent in §9(e) of the Agreement was allegedly violated. "Where the parties to a contract have specified therein the conditions upon which an action upon the contract may be maintained, such conditions precedent generally must be complied with before an action for breach of contract may properly be brought." Syl. Pt. 1, *Vaughan Const. Co. v. Virginian Ry. Co.*, 97 S.E. 278 (W.Va. 1918). There is no dispute regarding the right of parties to specify the conditions for which an action upon a contract may or may not be maintained. *Vaughan Const. Co.*, 97 S.E. at 280. "Under the broad

liberty of contract allowed by the law, parties may make performance of any comparatively or apparently trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and in such case the contract will be enforced or dealt with as made." Syl. Pt. 4, *Adams v. Guyandotte Valley Ry. Co.*, 61 S.E. 341 (W.Va. 1908).

If a condition precedent makes it incumbent upon a party to perform before any interest, right, title, or estate can vest, then the contract will not become operative until the condition precedent occurs. See *Adams v. Guyandotte Valley Ry. Co.*, 61 S.E. 341(W.Va. 1908). There can be no breach when a contract is canceled due to the failure of one party to perform a condition precedent because no rights have been vested during the time such condition was to have been performed. *Id.* "That failure to perform a condition precedent prevents the vesting of title or right is elementary law." *Id.*, 61 S.E. at 344. "A contract is not made so long as in the contemplation of both parties something remains to be done to establish a contract relation." *Miners' & Merchants' Bank v. Gidley*, 144 S.E. 2d 711, 715 (W.Va. 1965), *citing* *Federal Reserve Bank of Richmond v. Neuse Mfg. Co., et al.*, 196 S.E. 848 (N.C. 1938).

On March 8, 2004, Plaintiffs and Defendant entered into an Agreement, the substance of which Defendant agreed to purchase Plaintiffs' business. Section 9 of the parties' Agreement provides that Defendant's obligations to close "are subject to fulfillment by Seller or waiver by Buyer, prior to or on the date of Closing," of eight specific conditions numbered (a) through (h). Section 9(d) of Conditions to Buyer's Closing states:

> "Seller and Buyer shall have received all necessary governmental consents, including the approval of the West Virginia Public Service Commission and the consents to the assignment of Seller's customers including any municipal contract that may exist."

On April 11, 2006, before governmental approval of the Certificates transfer was able to occur, came the ruling of *Harper v. Public Service Commission of West Virginia*, which Defendant

alleges to be a violation of Section 9(e) of the Agreement. Then, on April 26, 2006, Defendant gave notice to Plaintiffs that it was terminating the Agreement pursuant to Section 9(e).

This Court is of the opinion that Defendant's conditions to closing were not satisfied by Plaintiffs at the time of the *Harper* decision, nor at the time of Defendant's notice of termination; and as a result, the parties' rights under the Agreement had failed to commence. When the *Harper* ruling was decided on April 11, 2006, the issue of whether the Certificates transfer would gain governmental approval was still undecided, thus failing to satisfy the condition set forth in Section 9(d) of the Agreement. Additionally, when the Defendant gave notice of termination on April 26, 2006, the issue of whether the *Harper* decision had made the transaction less economic was still undecided, thus failing to satisfy the condition set out in Section 9(e) of the Agreement. Therefore, this Court hereby finds that the parties' Agreement was not closed, nor was it completed, at the time Defendant gave its notice of termination.

Next, this Court has interpreted the Asset Purchase Agreement entered into between the parties. "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Orteza v. Monongalia County General Hosp.*, 318 S.E.2d 40 (W.Va. 1984) quoting Syl. Pt. 1, *Stephens v. Bartlett*, 191 S.E.2d 550 (W.Va. 1937). "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Orteza v. Monongalia County General Hosp.*, 318 S.E.2d 40 (W.Va. 1984) quoting Syl. Pt. 2, *Bethlehem Mines Corp. v. Haden*, 172 S.E.2d 126 (W.Va. 1969).

Although Plaintiffs argue that the parties' have different interpretations of §9(e) of the Agreement, this Court is of the opinion that the Agreement is unambiguous. "The term 'ambiguity' is defined as language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its

meaning." Syl. Pt. 4, *Estate of Tawney v. Columbia Natural Resources, LLC*, 633 S.E.2d 22 (W.Va. 2006). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, *Berkeley Co. Pub. Ser. Dist v. Vitro Corp.*, 162 S.E.2d 189 (1968).

"It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 1, *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 468 S.E.2d 712 (W.Va. 1996). "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Syl. Pt. 3, *Estate of Tawney v. Columbia Natural Resources, LLC*, 633 S.E.2d 22 (W.Va. 2006).

Section 9(e) of the Agreement states that "No law, ...writ or judgment of any court, ...shall have prevented or prohibited or make *less economic* the consummation of *the transactions* contemplated hereby." (emphasis added). This Court can only interpret §9(e) of the Agreement to mean that any new law created between the time of the parties' agreement and its closing date that decreases the value of the parties' "transaction," which is the sale of Plaintiffs' business to Defendant, is a violation of Defendant's conditions to closing. This Court finds that §9(e) of the Agreement refers to the economic environment in general during the time before closing of the Agreement and does not refer to future speculative profits or losses from Plaintiffs' business.

The language and meaning of §9(e) of the Agreement is clear and unambiguous. The Plaintiff and Defendant voluntarily and knowingly entered into the Agreement with the intent

that §9(e) would protect the Defendant, and allow it to revoke the Agreement, if a law was made that caused the value of the Agreement to significantly decrease. "This Court has indicated that where parties lawfully enter into a contract and their contract is free from ambiguity or doubt the contract furnishes the law which governs their relationships." *McKeny Const. Co., Inc. v. Town of Rowlesburg*, 420 S.E.2d 281, 284 (W.Va. 1992).

Having concluded that the language in §9(e) of the Agreement is clear and unambiguous, this Court must now consider whether any law was passed that made the transaction "less economic." In the case of *Harper, et al. v. Public Service Commission of West Virginia, et al.*, the United States Magistrate for the United States District Court for the Southern District of West Virginia "declared that West Virginia Code § 24A-2-5 is invalid insofar as it requires solid waste haulers engaged in the interstate transportation of solid waste to obtain a certificate of convenience and necessity from the PSC prior to providing those services." 427 F.Supp.2d at 724. As a result of the ruling in *Harper*, businesses engaged in the interstate transportation of solid waste are no longer required to possess a certificate of convenience and necessity to conduct their business.

This Court finds that Plaintiffs' Certificates were of considerable value to the Defendant, and the value of the Certificates were one factor if not the most significant factor that helped determine the Agreement's purchase price. The Certificates were valuable not only for the price Plaintiffs paid to acquire the Certificates but also because the Certificates limited competition in the areas for which they were assigned.

In *Harper*, the Court held that "[t]he certificate requirement of West Virginia Code § 24A-2-5 is a substantial barrier to entry of the trash collection and disposal market." 427 F.Supp.2d at 721. "It is difficult, if not impossible, for new haulers to enter the West Virginia

solid waste hauling market if a certificate is in place." *Id.* "Almost every area in West Virginia has a certified hauler or haulers and, as a result, with rare exception, firms enter the market only through acquisition of companies who hold existing certificates, as opposed to *de novo* application pursuant to West Virginia Code § 24A-2-5." *Id.* "In fact, any certificate holder can enjoy a substantial windfall by applying for and receiving a significant rate increase and then promptly selling the certificate...". *Id.*

As a result of the ruling in *Harper*, certificates that were once in high demand are essentially no longer needed for any business that intends to transport solid waste out of the state for disposal. Market areas that were once exclusive to solid waste haulers who possessed the certificates are now opened to competing solid waste hauling businesses. Accordingly, this Court finds that the *Harper* decision has affected the value and demand for the certificates.

Moreover, this Court finds the value of Plaintiffs' Certificates were at least one factor the parties' considered in establishing the Agreement's purchase price. That as a result of the ruling in *Harper*, Plaintiffs' Certificates have significantly decreased in value to the point of possibly having no worth. The decrease in value of Plaintiffs' Certificates has made the parties' transaction, the sale of Plaintiffs' business to Defendants, "less economic" as stated in section 9(e) of the Agreement. Therefore, this Court finds that Section 9(e) of Defendant's Conditions to Closing has not been satisfied.

Accordingly, this Court finds that Defendant could not have breached the Agreement nor could Plaintiff have detrimentally relied on the Agreement, because Defendant's conditions of closing were violated at the time Defendant gave notice of termination to Plaintiffs. Therefore, Defendant had the right to terminate the contract under Section 9 of the Agreement as no rights had vested due to the unsatisfactory completion of Defendant's conditions to closing.

Finally, this Court must determine whether Defendant's Motion for Summary Judgment is appropriate. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *West Virginia Rule of Civil Procedure 56(c).* "Summary judgment is appropriate where the record taken as a whole could not lead a rationale trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing of an essential element of the case that it has a burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994). Rule 56 is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved." *Id* at 758.

"A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact." Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 133 S.E.2d 770 (W.Va. 1963). "Roughly stated, 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that party. The opposing half of the trialworthy issue is present where the nonmoving party can point to one or more disputed 'material' facts. A material fact is one that has the capacity to sway the outcome of the litigation under applicable law." Syl. Pt. 5, *Jividen v. Law*, 461 S.E.2d 451 (W.Va. 1995). "A dispute about a material fact is 'genuine' only when a reasonable jury could render a verdict for the nonmoving party, if the record at trial were identical to the record compiled in the summary judgment proceedings before the circuit court." *Powderidge Unit Owners Ass'n v. Highland Hills Properties Ltd.*, 474 S.E.2d 872 (W.Va. 1996).

"If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, *Cavender v. Fouty*, 464 S.E.2d 736 (W.Va. 1995) quoting Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995). "The party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 451 S.E.2d 755, 758 (W.Va. 1994). "Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." Syl. Pt. 3, *Guthrie v. Northwestern Mut. Life Ins. Co.*, 208 S.E.2d 60 (W.Va. 1974).

There is no dispute that exists as to the facts material to the adjudication of the issues in this case: whether Defendant breached the Agreement with Plaintiffs, whether §9(e) of the Agreement is ambiguous, and whether a law was passed making the sale of Plaintiffs' business less economic. Having concluded upon those undisputed facts that the Agreement is unambiguous and the ruling in *Harper* adversely affected the value of the parties' Agreement, this Court has concluded that the Defendant did not breach the parties' Agreement, that Defendant is entitled to judgment as a matter of law, and that Defendant's Motion for Summary Judgment should be granted.

Findings of Undisputed Facts

1. On March 8, 2004, Plaintiffs and Defendant knowingly and intelligently entered into an Asset Purchase Agreement wherein Defendant agreed to purchase Plaintiffs' business including the rights to Plaintiffs' certificates of convenience and necessity, which under W.Va. Code § 24A-2-5 was required for any solid waste hauler to cross state lines in the transportation of solid waste.

2. The certificates of convenience and necessity had value as they cost money to acquire, were difficult to obtain, and restricted competition to solid waste hauling markets.

3. Plaintiffs' Certificates were of value to the Defendant and were at least one factor in the agreed upon purchase price for Plaintiffs' business.

4. On April 11, 2006, while the governmental approval of the parties' Certificates transfer was still being considered, the case of *Harper v. Public Service Commission of West Virginia* was decided in which the Court declared that West Virginia Code § 24A-2-5 was unconstitutional insofar as it required solid waste haulers engaged in the interstate transportation of solid waste to obtain a certificate of convenience and necessity from the Public Service Commission.

5. The ruling in *Harper* significantly reduced the value of Plaintiffs' Certificates by holding that businesses were no longer required to possess a certificate in order to transport solid waste across state lines.

6. On April 26, 2006, Defendant gave notice to Plaintiffs that it was terminating the parties' Agreement pursuant to Section 9(e) of the Agreement because the ruling in *Harper* adversely affected the value of Plaintiffs' Certificates and made the transaction "less economic."

7. The Plaintiff and Defendant voluntarily, knowingly, and intelligently entered into the Agreement with the intent that §9(e) would apply to any new law that affected the economic environment in general that would cause the value of the parties' Agreement to significantly decrease.

8. Section 9(d) of Defendant's conditions to closing, regarding all necessary governmental consents, was not satisfied by Plaintiffs at the time of the *Harper* decision on April 11, 2006, because governmental approval of the parties' Certificates transfer had not been decided.

9. Section 9(e) of Defendant's conditions to closing, regarding the creation of any new law that makes the transaction less economic, was not satisfied by Plaintiffs at the time of Defendant's notice of termination on April 26, 2006, because the *Harper* decision significantly reduced the value of Plaintiffs' Certificates.

10. The parties' Agreement was not closed, nor had it become operative, at the time Defendant gave notice of termination on April 26, 2006, as Defendant's conditions to closing had not been fulfilled by Plaintiff.

11. The ruling in *Harper*, which rendered certificates of convenience and necessity unnecessary for the transportation of solid waste across state lines, made the parties' Agreement "less economic."

WHEREFORE, it is **ORDERED, ADJUDGED, and DECREED** that the Motion for Summary Judgment of Defendant, Waste Management of West Virginia, Inc., is **GRANTED**.

The Circuit Clerk shall transmit attested copies of this Order to all counsel of record.

ENTERED this 1st day of October 2007.

MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

A copy, Teste:

Circuit Clerk

This is a final Order and the Court expressly determines that there is no just reason for delay, and directs that judgment be entered accordingly.

The Circuit Clerk shall transmit attested copies of this Order to all counsel of record.

ENTERED this 30th day of January, 200_.

MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

A copy, Teste: